

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35916

STATE OF IDAHO,)	2009 Unpublished Opinion No. 706
)	
Plaintiff-Respondent,)	Filed: December 1, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
VICTOR WHITNEY KLINGONSMITH,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Jon J. Shindurling, District Judge.

Judgment of conviction and unified sentence of twenty years, with a minimum period of confinement of eight years, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sara B. Thomas, Chief Appellate Unit, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

MELANSON, Judge

Victor Whitney Klingonsmith appeals from his judgment of conviction and unified sentence of twenty years, with a minimum period of confinement of eight years, for lewd conduct with a minor child under sixteen. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

In 2008, Klingonsmith, then a seventy-year-old man, went to the sheriff's office on the advice of an ecclesiastical leader and confessed to numerous incidents of manual-genital contact with his two adopted stepdaughters, E.K. and I.K, occurring in approximately 2001. At the time that they were abused, the girls were approximately six and ten years old, respectively. Klingonsmith was charged with three counts of lewd conduct with a minor child under sixteen. I.C. § 18-1508. Klingonsmith pled guilty to one count of lewd conduct involving E.K. and the state dismissed the remaining charges. The district court sentenced Klingonsmith to a unified

term of twenty years, with a minimum period of confinement of eight years. Klingonsmith appeals.

II. ANALYSIS

Klingonsmith argues that the district court denied him due process and abused its discretion at his sentencing hearing when it relied on a fact outside of the record to determine that older sex offenders have a higher risk of recidivism because their access to normal sexual contact decreases over time. Klingonsmith also contends that the district court relied upon this and other facts that were not supported by substantial evidence in the record. Klingonsmith further claims that his sentence is excessive.

At the sentencing hearing, the district court articulated its reasons for the sentence it imposed:

Well, Mr. Klingonsmith, I have reviewed all of this material very carefully, and I'm very concerned about the seriousness of this crime. We have here a little girl who was living with you in a situation where you were adopting her and engaged with her as a parental figure since she was very young. And all through that time or for a good part of that time molesting her and her sister.

And what's very troubling about that is that during that time you're doing that clandestinely, you're presenting yourself and have all of the trappings of being a solid churchgoing citizen, and all of this is just a -- all of that is just a bald-faced lie.

I was very troubled by the presentence -- or the psychosexual evaluation. As I went back through all of this history . . . it seems like at every stage in your life that you are not getting exactly what you want out of a relationship you turn to something that is not wholesome in terms of sexual mental health. A good deal of conduct over the years with -- at least reported some conduct over the years with prostitution, with voyeurism and frotteurism and other -- if not criminal, at least unhealthy sexual behavior.

There have been a number of other prior victims, although none of them necessarily in the same circumstance as this. But this has been building for a long time. And what's troubling about it is that you -- every time something occurs which shouldn't occur in your life, you make -- go through all of the trappings of straightening up and getting forgiveness and all of that stuff, and then you do it again. . . .

As I thought a good deal about the recommendations here, reading [the psychosexual evaluator's] summary, he tells me you're a power-reassurance type sex offender, which means that you engage in sexual assaults as a means of exercising dominance, mastery, strength, authority, and control. You tend to be more compulsive in your behavior, utilizing fantasies and plans more determinedly than other types of offenders.

It's clear from the comments of [the psychosexual evaluator] that he feels that you were working pointedly in this case to groom these children.

He says that your arousal patterns seem to be deviant, interpersonally exploitive, and repeatedly reinforced. He says it was very clear to you that you were -- you knew the child's vulnerability and age at the time that these things were occurring.

He points out that the -- in addition to not being able to pass a polygraph -- in other words, the polygraph suggests that there's still unknown elements of your sexual history, and so he can't make any recommendation as to whether we've got a clear and complete sexual history here.

You also gave . . . self-benefiting answers [on psychometric tests] that show up on the test as an effort to skew the test to make you look more positive than it should.

He says but from what he can glean from the psychometrics that were completed, you have -- or you exhibit low self-worth, poor judgment, impulse control -- poor judgment and impulse-control skills. You externalize blame. And that's been pointed out here. That you're immature, sexually maladjusted, irresponsible, distrustful, and suspicious. You present dependency issues, interpersonal ineptness, anger and frustration concerns, and are self-centered.

He points to your very difficult childhood and says that that's -- although that's a mitigating factor, it's not a causal factor here. In other words, you don't do this because you had abandonment issues when you were young, although it may contribute to the severity of what goes on.

Given all of those problematic issues, [the psychosexual evaluator] said you're not a candidate for probation because you are not a candidate for sex offender treatment in the community. And, frankly, without the latter, there's no way that we can make any effort whatsoever to ensure that this is not going to be an ongoing problem.

And I would note, he doesn't say it in here, but it is a -- it's axiomatic, with pedophilic behaviors such as this, that the -- as the access to normal sexual contact decreases with age, the inclination to engage in illicit pedophilic sexual behavior increases. And that goes right up until you're so geriatric you can't walk or talk. It's an interesting phenomenon, but it's well documented in the academic information available on sex offenders.

So to put it mildly, I am concerned about what's going on here. I'm concerned with the capability that you might have, if any, to change course. I'm concerned with the lack of sincerity that you have engaged in over the years, as you have been confronted in various circumstances with sexually unacceptable behavior, and the total lack of sincerity, as I see it, in your reported attempts to engage in repentive [sic] behavior and straighten up your life. I just don't think you've ever done it. I think you change things to get what you want, but as soon as things aren't what you want anymore, you go back to the old pattern. And given that kind of repeated history, I have strong doubts that you are rehabilitatable [sic] in any form.

. . . .

In addition to the Presentence Investigation Report, I have reviewed the objectives of criminal punishment established by the Idaho Supreme Court. In your case, I consider them all to be important. It's important that I protect society. It's important that I deter you and others like you from committing this type of crime in the future. It's important that I see to your rehabilitation, and it's important there be an element of punishment.

I have also reviewed and considered the criteria set forth in Idaho Code Section 19-2521 relative to whether I place you on probation or send you to prison.

Based upon all of the circumstances of this case, it is the judgment of the Court that you be sentenced to the custody of the Idaho Board of Correction for a minimum period of 8 and a maximum period of 20 years. . . .

Klingonsmith argues that the district court abused its discretion and denied him due process when it referred to the “axiomatic” fact that illicit pedophilic sexual behavior increases with age as a result of the decline in normal sexual contact. The district court’s reference to academic studies which were not part of the record is error. *See State v. Morgan*, 109 Idaho 1040, 1043, 712 P.2d 741, 744 (Ct. App. 1985). However, error is not reversible unless it is prejudicial. *State v. Stoddard*, 105 Idaho 169, 171, 667 P.2d 272, 274 (Ct. App. 1983). With limited exceptions, even constitutional error is not necessarily prejudicial error. *Id.* It is unnecessary to remand for another sentencing hearing when it is plain from the district court’s reasoning that the result would not change. *Morgan*, 109 Idaho at 1043, 712 P.2d at 744.

In this case, the district court described, at length, its reasons for imposing the sentence it did. Among the multitude of reasons it gave, the district court found that Klingonsmith’s past pattern of behavior, as well as the psychosexual evaluator’s conclusion that Klingonsmith could not be treated in the community, led to the conclusion that he had little chance of success of rehabilitation. The district court then made reference to the correlation between age and reoccurrence of sexual abuse among pedophiles, which the district court characterized as “well documented in the academic information available on sex offenders.” Here, we deem it clear from the district court’s own remarks that its decision was predominantly based upon facts in the record. Therefore, we conclude that a remand would not lead to a different result.

Klingonsmith next argues that the district court abused its sentencing discretion by relying on facts that were not supported by the record. The facts of which Klingonsmith complains are the that illicit pedophilic behavior increases with age due to the decline of normal sexual contact and that Klingonsmith was molesting the girls for a substantial part, if not all, of

the time that he was parenting them. We have already addressed the district court's use of the alleged fact that pedophilic behavior increases with age and do not need to address it further. Concerning the period of time during which Klingonsmith sexually abused his adopted step-daughters, he contends that the record only shows that the abuse occurred during a discrete period of time. Contrary to Klingonsmith's assertions, the presentence investigation report contains information, including Klingonsmith's own statements, that the abuse occurred over a longer period of time. A sentencing court is free to consider the results of a presentence investigation if the reliability of the information contained in the report is insured by the defendant's opportunity to present favorable evidence, to examine all the materials contained in the report, and to explain or rebut adverse evidence. *State v. Campbell*, 123 Idaho 922, 926, 854 P.2d 265, 269 (Ct. App. 1993). The court may consider hearsay evidence, evidence of previously dismissed charges against the defendant or evidence of charges which have not yet been proved so long as the defendant has the opportunity to object to, or to rebut, the evidence of his or her alleged misconduct. *Id.* See also I.C.R. 32(e)(1), (2). Therefore, the district court did not abuse its discretion by considering this information when pronouncing Klingonsmith's sentence.

Lastly, Klingonsmith acknowledges that his sentence is within the statutory limits, but argues that it is excessive under any view of the facts. Our appellate standard of review and the factors to be considered when evaluating the reasonableness of a sentence are well established. *State v. Burdett*, 134 Idaho 271, 1 P.3d 299 (Ct. App. 2000); *State v. Sanchez*, 115 Idaho 776, 769 P.2d 1148 (Ct. App. 1989); *State v. Reinke*, 103 Idaho 771, 653 P.2d 1183 (Ct. App. 1982); *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982). Klingonsmith contends that he should have received a lesser sentence because this was his first conviction, he showed remorse for his conduct and turned himself into authorities, he expressed willingness to receive treatment, and that he has a positive character. The district court considered these factors when it imposed Klingonsmith's sentence. Specifically, the district court found that, while this was Klingonsmith's first conviction, his psychosexual evaluation revealed a pattern of sexually-deviant and, at times, criminal behavior over a period of many years. Additionally, the district court found that his remorse and willingness to receive treatment followed his pattern of failed attempts to change his behavior when it was beneficial for him to do so. Furthermore, the district court found that Klingonsmith's appearance as an upstanding, churchgoing citizen while

he was sexually abusing his adopted step-daughters was all the more troubling as it masked his conduct and could potentially put society at greater risk. Having reviewed the record in this case, we cannot say that the district court abused its discretion.

III.

CONCLUSION

The district court's reference to the increased risk of pedophilic behavior with age as normal sexual activity decreases was harmless error. Klingonsmith's abuse of his adopted daughters over a lengthy period of time was supported by evidence in the record. Therefore, the district court did not abuse its discretion by considering this information. Klingonsmith's sentence is not excessive under any view of the facts. Accordingly, Klingonsmith's judgment of conviction and unified sentence of twenty years, with a minimum period of confinement of eight years, for lewd conduct with a minor child under sixteen is affirmed.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**